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Sim Kooi Soon v Malaysia Airlines System (No 2)

COURT OF APPEAL (PUTRAJAYA) — APPLICATION NO W-04–22 OF 2005
ABDUL MALIK ISHAK, KANG HWEE GEE AND AZHAR MA'AH JJCA
22 OCTOBER 2010

Administrative Law — Judicial review — Application for — Review of decision of Court of Appeal — Whether appellant was vexatious litigant — Whether averments raised in appellant's affidavit in support of present application relevant — Whether court should put an end to appellant's incessant review applications — Courts of Judicature Act 1964 item 17 Schedule

Civil Procedure — Parties — Vexatious litigant — Whether same party being sued repeatedly on same cause of action — Whether appellant heeded court's orders and warnings — Remedy — Whether court should put an end to appellant's incessant review applications — Courts of Judicature Act 1964 item 17 Schedule

The appellant, was an employee of the respondent. When his employment as a captain/commander of the respondent's aircraft was terminated he sought reinstatement, backwages, as well as, general and aggravated damages of RM8 billion and certain privileges and benefits. Dissatisfied with the decision of the High Court the appellant had appealed to the Court of Appeal ('CA'). Thereafter he had applied for numerous judicial reviews of the decision of the CA. By way of the present application the appellant sought a review of the CA's dismissal of his application to adduce further evidence as well as another review of his appeal against the decision of the High Court. Prior to filing the present application the appellant had already filed ten other review applications of the same nature with minor variations, which were all dismissed with costs. At the hearing of the tenth review application the appellant was advised by the very same panel of the CA to file an application for leave to appeal to the Federal Court. However, despite withdrawing the tenth review application, which application was dismissed with costs by this court, the appellant has now proceeded to file the present application applying for the same remedy. It thus became necessary for the court to consider whether the appellant was a vexatious litigant and how to put an end to his incessant review applications.

Held, dismissing the application with costs:

(1) The court found the appellant, who kept on filing the same application suing the same party repeatedly on essentially the same cause of action,

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with minor variations, to be a vexatious litigant. The court also found that by being a vexatious litigant the appellant ignored orders and warning given by this court, such as the consequences of being in contempt of court. Further, it was found that the appellant by being a vexatious litigant had consumed substantial amounts of precious judicial time and clogged the court dockets. The appellant's unmeritorious claims were found to not only cause wastage of judicial time but also unnecessarily high costs to the opposite parties who had to expend money defending such applications or suits (see paras 1–9).

(2) The averments raised in the appellant's affidavit in support of the present application were found to be irrelevant and extraneous to the application. Further the said averments could be classified as baseless, scandalous and vexatious with grave insinuations of a former judge of the Federal Court and against a senior member of the bar who was also the respondent's counsel. In the circumstances, the present application was another attempt to file frivolous and vexatious applications seeking for remedies that were without any basis in law (see paras 14–18).

(3) In the tenth review application, which was the application filed before the present application and was similar to the present one, the appellant had been advised to apply for leave to appeal to the Federal Court. Despite such advice, the appellant had continued to make scandalous and baseless allegations against the respondent and the judiciary in the present application. Thus to put an end to the appellant's incessant review applications this court made an order pursuant to art 17 in the Schedule to the Courts of Judicature Act 1964 to restrain the appellant from instituting further legal proceedings in any court save by leave of the Court of Appeal, with a copy of this order published in the *Gazette* (see paras 21, 22, 27–30).

[Bahasa Malaysia summary

Perayu adalah pekerja responden. Apabila pekerjaannya sebagai kapten/komander pesawat responden ditamatkan dia memohon untuk pengembalian kedudukan jawatan, gaji tertunggak di samping ganti rugi am dan tambahan sebanyak RM8 bilion dan hak istimewa dan faedah tertentu. Tidak puas hati dengan keputusan Mahkamah Tinggi, perayu merayu kepada Mahkamah Rayuan ('MR'). Kemudiannya dia memohon untuk beberapa semakan kehakiman terhadap keputusan MR. Melalui permohonan ini perayu memohon semakan penolakan MR terhadap permohonannya untuk mengemukakan selanjutnya keterangan dan juga semakan lain terhadap rayuannya terhadap keputusan Mahkamah Tinggi. Sebelum memfailkan permohonan ini perayu telah memfailkan sepuluh permohonan semakan yang lain yang sama sifatnya dengan sedikit pelbagaian, yang mana kesemuanya ditolak dengan kos. Semasa pendengaran permohonan semakan yang kesepuluh perayu dinasihatkan oleh panel MR yang sama untuk memfailkan

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permohonan untuk kebenaran merayu ke Mahkamah Persekutuan. Walau bagaimanapun meskipun menarik balik permohonan semakan yang kesepuluh, permohonan yang mana ditolak dengan kos oleh mahkamah ini, perayu sekarang ini meneruskan untuk memfailkan permohonan ini memohon untuk remedi yang sama. Oleh itu, adalah menjadi keperluan untuk mahkamah mempertimbangkan sama ada perayu adalah litigan yang menyusahkan dan bagaimana untuk menamatkan permohonan-permohonan semakan yang tak henti-henti ini.

Diputuskan, menolak permohonan dengan kos:

(1) Mahkamah mendapati perayu, yang tidak henti-henti memfailkan permohonan yang sama yang menyaman pihak yang sama berulangkali atas secara asasnya kausa tindakan yang sama, dengan sedikit pelbagaian, adalah litigan yang menyusahkan. Mahkamah juga mendapati bahawa dengan menjadi litigan yang menyusahkan perayu tidak memperdulikan perintah-perintah dan amaran yang diberikan oleh mahkamah ini, seperti menyebabkan penghinaan mahkamah. Selanjutnya, didapati bahawa perayu dengan menjadi litigan yang menyusahkan telah mengambil banyak masa kehakiman yang berharga dan menghambat kelancaran doket mahkamah. Tuntutan tidak bermerit perayu didapati bukan hanya menyebabkan pembaziran masa kehakiman tetapi juga kos terlalu tinggi kepada pihak-pihak lawan yang terpaksa membelanjakan wang mempertahankan permohonan-permohonan atau tindakan-tindakan sedemikian (lihat perenggan 1–9).

(2) Hujahan-hujahan yang dibangkitkan dalam afidavit perayu yang menyokong permohonan ini didapati adalah tidak relevan dan berlebihan kepada permohonan. Selanjutnya hujahan-hujahan tersebut boleh diklasifikasikan sebagai tidak berasas, melampau dan menyusahkan dengan sindiran-sindiran serius terhadap bekas hakim Mahkamah Persekutuan dan terhadap ahli kanan majlis peguam yang juga peguam responden. Dalam keadaan ini, permohonan ini adalah satu lagi cubaan untuk memfailkan permohonan-permohonan remeh dan menyusahkan, memohon untuk remedi-remedi yang tidak mempunyai apa-apa asas dari segi undang-undang (lihat perenggan 14–18).

(3) Dalam permohonan yang kesepuluh, yang mana adalah permohonan yang difailkan sebelum permohonan ini dan adalah sama kepada permohonan ini, perayu telah dinasihatkan untuk memohon kebenaran untuk merayu kepada Mahkamah Persekutuan. Meskipun nasihat sedemikian, perayu masih meneruskan membuat tuduhan-tuduhan melampau dan tidak berasas terhadap responden dan badan kehakiman dalam permohonan ini. Oleh itu, untuk menamatkan permohonan-permohonan semakan yang tak henti-henti ini mahkamah ini membuat perintah berikutan perkara 17 dalam Jadual kepada Akta

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Mahkamah Kehakiman 1964 untuk menghalang perayu daripada memulakan prosiding-prosiding undang-undang lanjut di dalam mana-mana mahkamah kecuali dengan kebenaran Mahkamah Rayuan, dengan salinan perintah ini diterbitkan di dalam Warta (lihat perenggan 21, 22 & 27–30).]

Notes

For a case on vexatious litigants, see 2(2) *Mallal's Digest* (4th Ed, 2010 Reissue) para 5759.

For cases on application for judicial review, see 1(1) *Mallal's Digest* (4th Ed, 2010 Reissue) paras 254–279.

Cases referred to

Hardial Singh Sekhon v PP [2009] 5 CLJ 101, CA (refd)

Sim Kooi Soon v Malaysia Airlines System [2010] 1 AMR 219 (refd)

Legislation referred to

Courts of Judicature Act 1964 item 17

Appeal from: Application for Judicial Review No R1–25–87 of 2001 (High Court, Kuala Lumpur)

Applicant in person.
Janice Leo (Maximilian Tai with her)(Shook Lin & Bok) for the respondent.

Abdul Malik Ishak JCA (delivering judgment of the court extempore):

[1] What is the hallmark of a vexatious litigant? The claimant who sues the same party repeatedly in reliance on essentially the same cause of action, perhaps with minor variations, is termed as a vexatious litigant.

[2] And a vexatious proceeding is one where the vexatious litigant had little or no basis in law and its effect was to subject the opposing party to inconvenience.

[3] In *Hardial Singh Sekhon v Public Prosecutor* [2009] 5 CLJ 101, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal spoke of a vexatious litigant in this way (see p 103 of the report):

> The appellant is a declared and gazetted vexatious litigant. He brought an election petition against the former Prime Minister and others claiming relief. The appellant did not obtain leave to bring the petition. Hence the petition was obviously unsustainable and was dismissed out of hand.

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[4] On the appropriate sentence to mete out against Hardial Singh Sekhon, His Lordship Gopal Sri Ram JCA (later FCJ) had this to say at p 103 of the report:

> After having heard the appellant and the learned deputy in reply, we came to the conclusion that the term of imprisonment imposed was excessive having regard to the nature of the contempt committed.
>
> While it is true that the court has power to impose a term of imprisonment upon a contemnor, the power is one that should be exercised with circumspection. In this case we agree that having regard to the defiant conduct exhibited by the appellant before the learned judge, imprisonment was well deserved. However, taking into account the obviously frivolous nature of the petition filed, the appellant's stand that he did what he did in the public interest, the appellant's age and the other circumstances of the case, including public interest, we considered a term of eight months imprisonment to be a more appropriate punishment. We therefore set aside the order of the judge and sentenced the appellant to eight months imprisonment.

[5] Sim Kooi Soon, you are a vexatious litigant. You keep on filing the same application one after another. You do not know when to stop. You exhibit the classic symptoms of a variant of de Clerambault's syndrome. It is a syndrome named after a French psychiatrist, Ga tan de Clerambault who described such syndrome as 'litigious behaviour' (see Baruk H, *Les d lires passionels* in (1959) *1 Trait de Psychiatrie* at pp 532–540 reproduced in *Themes and Variations in European Psychiatry* [1974] (editors Hirsch S and Shepherd M)). According to the French psychiatrist Baruk H, patients *who undertake a series of lawsuits, the first leading to others along with numerous pleas and hearings… become threatening and insulting and often denounce magistrates, lodge repeated complaints and sometimes become dangerous*. The writer further explained that de clerambault's syndrome does not involve hallucinations. Sufferers, according to the writer, display a vehement and passionate attitude of filing unsustainable claims against others.

[6] As a vexatious litigant you ignored orders from the court. You were advised to obtain leave from the Federal Court before you pursued the matter further. You were warned as to the consequences of being in contempt of court. In *Sim Kooi Soon v Malaysia Airlines System* [2010] 1 AMR 219, this was what Dato' Abdul Malik bin Ishak JCA writing for the Court of Appeal said (see at pp 227–228 of the report):

> [13] We are constrained to say that this court has no jurisdiction to review its previous decision made on 5 December 2006 and the applicant is advised to file an application for leave to appeal to the Federal Court. That would be the best course of action for the applicant to undertake. Accordingly, encl 134a should be dismissed forthwith with costs bearing in mind that it has no merit and has no basis, in law, whatsoever.

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[14] Lest I be accused of an oversight, I must venture further and I say that the persistent conduct of the applicant in filing eight review applications prior to filing the present application in encl 134a peppered with *baseless, scandalous and/or vexatious aspersions and/or insinuations directed at the previous eight (8) panel members of the Court of Appeal* that have heard and dismissed all eight review applications were done in bad faith and without regard to the consequences attendant thereto. Those unfounded allegations against the eight (8) panel members of the Court of Appeal are contemptuous in nature. We have wide and extensive contempt powers vested in us but, we will always exercise it cautiously, judiciously and not callously. As Lord President Clyde said in *Walter Lyulph Johnson v John Grant And Others* (1923) SC 789, at p 790 which was cited with approval, inter alia, by Lord Edmund-Davies in *Attorney-General v Leveller Magazine Ltd And Others*, *Attorney-General v National Union of Journalists*, *Attorney-General v Peace News Limited And Ors* [1979] AC 440, at p 459:

> The phrase 'contempt of court' does not in the least describe the true nature of the class of offence with which we are here concerned… The offence consists in interfering with the administration of the law; in impeding and perverting the course of justice… It is not the dignity of the court which is offended— a petty and misleading view of the issues involved—it is the fundamental supremacy of the law which is challenged.

[15] We say that 'hurling insults at judges' as reflected in the affidavits of the applicant constitute 'contempt in the face of the court'. Wilmot J, in the celebrated case of *The King v Almon* (1765) 97 ER 94,1–3 Wilm 243, 254, at p 99 in trenchant terms said:

> The power, which the courts in Westminster Hall have of vindicating their own authority, is coeval with their first foundation and institution; it is a necessary incident to every Court of Justice, whether of record or not, to fine and imprison for a contempt to the court, acted in the face of it.

[16] Even Lord Denning MR in *Morris v Crown Office* (1970) 2 QB 114, (CA), at p 122, (1970) 1 All ER 1079, at p 1081 made these apt observations in the context of 'contempt in the face of the court':

> The phrase 'contempt in the face of the court' has a quaint old-fashioned ring about it; but the importance of it is this: of all the places where law and order must be maintained, it is here in these courts. The course of justice must not be deflected or interfered with. Those who strike at it strike at the very foundations of our society. To maintain law and order, the judges have, and must have, power at once to deal with those who offend against it. It is a great power — a power instantly to imprison a person without trial — but it is a necessary power.

[17] Cases like *Ex parte Pater* (1864) 122 ER 842, 5 B & S 299; *The Queen v Lefroy* (1872–73) 8 LR QB 134; *Sparks, & C v Martyn* [1726] 1 & 2 Ventris 1; *Regina v Monette* (1975) 64 DLR (3d) 470 at 474; *Her Majesty The Queen v Kevin Ernest Dunning* (1979) 50 CCC (2d) 296, (CA); *Canadian Broadcasting Corp v Quebec (Police Commission)*, *Canadian Broadcasting Corporation et al v Cordeau et al*

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> (1979) 101 DLR (3d) 24; *Vaillancourt v The Queen* (1981) 120 DLR (3d) 740; and, *The King v Metal Trades Employers' Association And Others Ex Parte Amalgamated Engineering Union, Australian Section* (1950-1951) 82 CLR 208, laid down one singular principle of law. It is this. That the power to punish contempt is an inherent power vested in all courts. We were urged, by way of an affidavit in reply, to take an appropriate action against the applicant for making those 'baseless, scandalous and/or vexatious aspersions and/or insinuations directed at the previous eight panel members of the Court of Appeal' but we decline, fortunately, to do so. We are of the considered view that we should temper justice with mercy. But this should not give a false impression that this court is lenient towards the applicant. Neither should our magnanimous gesture be construed as giving a carte blanche to the applicant to repeat what he has done. The applicant is advised from repeating the same mistake again.

[7] Unmeritorious claims and claims brought for improper reasons merely clog the court dockets. And such claims must be dismissed in limine Byron C Keeling, *Toward a Balanced Approach to Frivolous Litigation: A Critical Review of Federal Rule II and State Sanctions Provisions*,' 21 Pepp L Rev 1067, 1134 [1994] aptly said:

> Judges perceive that a principal factor in the increasing size of their dockets is litigation abuse — in particular, frivolous filings.

[8] Apart from impacting the dockets and causing delays in the legal system, vexatious and frivolous suits consume substantial amounts of our scarce judicial time. As a vexatious litigant, you have filed numerous applications of the same nature. It has generated many hours of work by filing meaningless documents. Your antics have done little more than consume precious judicial time.

[9] Beyond the delay and the wastage of judicial time resulting from vexatious and frivolous applications, there is the costs incurred by the opposing parties who must defend against these applications. Vexatious proceedings are extraordinarily costly to the opposite parties, who needlessly incur added litigation expenses. The defendants named in vexatious and frivolous applications or suits have only two choices to resort to: firstly, expend money defending the application or suit; secondly, settle the application or suit for as small an amount as possible.

[10] Sim Kooi Soon, prior to filing the present application in encl 154a, you have filed ten other review applications of the same nature with minor variations. In fact, together with encl 154a, you have filed altogether 11 such review applications. In the affidavit supporting encl 154a that was affirmed on 2 August 2010, you cast aspersions against a former judge of the Federal Court

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as well as against a senior member of the bar. You also painted in bad light the respondent's human resource manager.

[11] In your notice of motion in encl 154a, you sought the following prayers:

(a) Bahawa keputusan-keputusan Mahkamah hingga terkini adalah haram dan di'annulled'.

(b) Pemohon/Perayu Sim Kooi Soon dibenarkan permohonannya yang dipohon.

[12] Basically, prayer (i) of encl 154a sought to review the decision of this court on 5 December 2006 when this court dismissed your application to adduce further evidence as well as your appeal against the decision of the High Court dated May 4, 2005 (see *Sim Kooi Soon v Malaysia Airlines System* at p 223). On ten previous sittings of this court, your review applications were dismissed with costs and your prayer (i) of encl 154a also sought to annul the ten previous decisions of this court. In our judgment, it is wrong in law to seek annulment of the ten previous decisions of this court and it is also an abuse of the process of this court and, consequently, it should be dismissed in limine. Today, your notice of motion in encl 154a should be dismissed forthwith. It is not only vexatious, it is also frivolous.

[13] In your affidavit affirmed on 2 August 2010 in support of encl 154a, you sought re-instatement of your previous position as captain/commander of the respondent's aircraft. You also prayed for an order that the respondent would train you as an Airbus A380 commander to successful completion at no cost to yourself and then employ you in that capacity till legal retirement age. You also sought back wages, benefits of every imaginable kind as well as the perks, privileges and benefits derived from MAPA's agreement with the respondent. You also sought for general and aggravated damages to the tune of RM8 billion.

[14] It is our judgment that the averments in your affidavit and the matters raised therein are irrelevant and extraneous to your application in encl 154a.

[15] It is also our judgment that the averments in your affidavit can also be categorised as baseless, scandalous and vexatious with grave insinuations directed at a former judge of the Federal Court and against a senior member of the bar who happens to be the respondent's counsel. The averments in your affidavit too contained unsubstantiated allegations which you relied upon as the purported reasons or justifications to annul the ten previous decisions of this court. The attempt to annul all the previous decisions of this court is a reflection of an attempt by you to re-open the appeal and to re-litigate the same.

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[16] Your present application in encl 154a is clear proof of your persistence and your relentless effort in filing frivolous and vexatious applications of such a nature.

[17] And the remedies which you sought can best be described as misconceived and without any basis in law.

[18] Since this court had dismissed your appeal on 5 December 2006 there is nothing for you to stand onto. Your foundation, so to speak, collapsed like a deck of cards when this court dismissed your appeal on 5 December 2006.

[19] Your tenth review application that was filed on 19 February 2010 was heard by this very panel on 13 May 2010 and you decided to withdraw the review application marked as encl 147a and this very panel forthwith dismissed encl 147a with costs. This very panel also advised you to file an application for leave to appeal to the Federal Court.

[20] The appellant in *Hardial Singh Sekhon v Public Prosecutor* was *a declared and gazetted vexatious litigant* and a charge of contempt was framed against him by the High Court and the High Court found him guilty of contempt and sentenced him to 12 months imprisonment. On appeal, Gopal Sri Ram JCA (later FCJ) speaking for the Court of Appeal reduced the sentence of imprisonment to eight months.

[21] We do not want you to suffer the same fate as *Hardial Singh Sekhon*. We advise you, once again, to file an application for leave to appeal to the Federal Court.

[22] You have shown no remorse nor do you respect this court. You persist in making baseless and scandalous allegations against the respondent and the judiciary. Such blatant and contemptuous acts cannot go unpunished nor can it be swept under the carpet.

[23] On 21 October 2010 at about 4.45pm, we were handed an affidavit in reply affirmed by your goodself on 21 October 2010 and that affidavit in reply was marked by the registry as encl 159.

[24] We have anxiously perused through your affidavit in reply in encl 159 and we noted that just because the respondent's solicitors Messrs Shook Lin & Bok had on, 20 August 2010, filed an application in the Kuala Lumpur High Court vide Originating Summons No S24–1874 of 2010 for, inter alia, an order that you be declared a vexatious litigant and an order that you be

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restrained from initiating any legal action except with leave of the court, you now seek the aid of this court to cite all the advocates and solicitors in Messrs Shook Lin & Bok for contempt.

[25] We also noted that the Kuala Lumpur High Court vide Originating Summons No S24–1874 of 2010 has yet to be fixed for hearing.

[26] In your affidavit in reply in encl 159, you continuously made baseless and scandalous allegations against the law firm of Messrs Shook Lin & Bok which we do not propose to reproduce them in this judgment. Suffice for us to say that uncalled for remarks were made by you against the law firm of Messrs Shook Lin & Bok.

[27] We have to put an end to your incessant review applications.

[28] We will now refer to art 17 in the schedule to the Courts of Judicature Act 1964 which states as follows:

> 17 Vexatious litigants
>
> Power to restrain any person who has habitually and persistently and without reasonable cause instituted vexatious legal proceedings in any court, whether against the same or different persons, from instituting any legal proceedings in any court save by leave of a Judge. A copy of any such order shall be published in the *Gazette*.

[29] And flowing from that we now make an order that in the exercise of the powers conferred upon this court pursuant to art 17 in the schedule to the Courts of Judicature Act 1964, you Sim Kooi Soon is hereby restrained from instituting any further legal proceedings in any court save by leave of the Court of Appeal and it is further ordered that a copy of this order be published in the *gazette*.

[30] As a serial litigator, it is justifiable that you Sim Kooi Soon should be declared a vexatious litigant and we reiterate that a gazette notification will issue to declare you as such. Let it be known that if you persist in instituting any further legal proceedings in any court without leave of the Court of Appeal, a contempt proceeding may be initiated against you by the respondent and you will find yourself incarcerated just like *Hardial Singh Sekhon*.

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[31] For the reasons adumbrated above, we unanimously dismiss encl 154a with costs. We fix costs at RM10,000 and it is to be paid by you to the respondent forthwith.

Application dismissed with costs.

Reported by Kohila Nesan